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NO. 284

OCTOBER TERM, 1963

IN THE

Supreme Court of the United States

PAUL DOYLE ARTELL,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ANSWER OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES Respondent, The State of Texas, and respectfully files this its Answer in Opposition to the Petition for Writ of Certiorari.

CITATION TO OPINION BELOW

The opinion in the Court of Criminal Appeals of Texas is not yet reported. A copy of the opinion is printed in the Petitioner's Application for Writ of Certiorari, as Appendix "A."

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under Title 28, U.S.C.A., § 1257 (3). The Respondent denies that there is a substantial Federal question presented for review by this Honorable Supreme Court.

QUESTION PRESENTED

The Petitioner contends four complex questions are presented for review by this Court in this case. With this, the Respondent cannot agree. The questions which the Petitioner contends are presented for review are hypothetical and not founded in the facts of the case. The questions are also concerned with rules of evidence and non-Federal questions.

The sole question presented in this case is whether the Court of Criminal Appeals erred in its decision that probable cause existed for the lawful arrest of the Petitioner, and consequently, whether the pistol found in the possession of the Petitioner and testimony concerning his possession of the pistol were admissible in evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner has relied upon the due process of law and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States, and the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; Article 1, § 9, of the Constitution of Texas; Rules 3, 4, 41(e), of the Federal Rules of Criminal Procedure, and Article 727a, Vernon's Ann. Code of Criminal.

Procedure of Texas. The text of all of these constitutional and statutory provisions are printed in the petition.

In addition thereto, the Respondent relies upon Article 725b, Vernon's Ann. Penal Code of Texas, which in part provides:

> "It shall be unlawful for any person . . ., possess, have under his control, . . . any narcotic drug."

STATEMENT OF THE CASE

Respondent denies each and every allegation of fact stated by Petitioner in his petition, except those facts supported by the record and those facts specially admitted by the Respondent.

The Petitioner was charged by complainf and information with the misdemeanor offense of carrying on or about his person a pistol in violation of Article 483, Vernon's Ann. Penal Code of Texas. In a trial before the Court, the Petitioner was found guilty and his punishment was fixed by the Court at sixty days' confinement in jail. An appeal was taken to the Court of Criminal Appeals of Texas, the highest criminal appellate court in the State of Texas, and on March 13, 1963, the judgment of the trial court was affirmed. A motion for rehearing was overruled without written opinion on April 24, 1963.

The facts of this case are simple. The Respondent adopts for the purpose of this answer the facts as found by the Court of Criminal Appeals, and stated in the opinion as follows:

> "Officer Garcia, of the Narcotics Division of the Houston Police Department, testified that on

the day in question he received information by telephone from a reliable and credible person that the Appellant could be found in the 1600 block of Houston Avenue, in a 1960 green Chevrolet, license No. SR 6700, and that he had a quantity of narcotics in his possession; that he, in company with Officer Strickland and others, proceeded at once to said location, and as he approached the automobile which had been described to him, he observed Appellant, who was seated therein alone, 'reaching under the front seat directly behind him.' He identified himself as an officer, reached under the seat and pulled out a black holster that contained a .38 caliber Smith and Wesson revolver. Appellant was then carried to the station, and Officer Strickland took charge of the weapon and made out the offense report. Appellant did not testify or offer any evidence in his own behalf, and we find the evidence sufficient to support the conviction."

ARGUMENT

If the arrest of the Petitioner was lawful, a contemporaneous search was not unreasonable, and the pistol found as a result of the search was admissible in evidence. **Draper v. United States**, 358 U.S. 307, 79 S. Ct. 329, 2 L. Ed. 2d 1503; **Agnello v. United States**, 269 U.S. 20, 46 S. Ct. 4; **Rabinowitz v. United States**, 339 U.S. 56, 70 S. Ct. 430.

The arrest of the accused without a warrant is lawful, if made by an officer having probable cause for the belief that a felony offense has been or is being committed. **Draper v. United States**, 358 U.S. 307, 79 S. Ct. 329; **Brinegar v. United States**, 338 U.S. 160, 69 S. Ct. 302; and **Carroll v. United States**, 267 U.S. 132, 45 S. Ct. 280.

The possession of narcotics is a felony offense. Article 725b, Vernon's Ann. Penal Code of Texas.

From the facts presented in this case, the Texas Court of Criminal Appeals has correctly found that the arrest of the Petitioner was lawful in uniformity with many prior cases cited by the Court. **French v. State,** 284 S.W. 2d 339; **Sanders v. State,** 312 S.W. 2d 640; **Slaughter v. State,** 314 S.W. 2d 92; **Bridges v. State,** 316 S.W. 2d 575; **Baray v. State,** 321 S.W. 2d 87; **McCall v. State,** 322 S.W. 2d 291; and **Leal v. State,** 332 S.W. 2d 729.

Certiorari should not be granted in this case for the reason that the facts show that the Petitioner was lawfully arrested, and that the search was reasonable, and seizure of the pistol was authorized. The constitutional provisions applicable and the cases relied upon by the Petitioner were considered by the Court of Criminal Appeals. The granting of certiorari in this case could only be for the purpose of reviewing and determining under its facts whether the arrest of the Petitioner was lawful. It is respectfully submitted that this determination has been properly made by the Court of Criminal Appeals of Texas. This case does not present new issues in which this Honorable Court could give further guidance for subsequent cases.

ARGUMENT IN ANSWER TO QUECTIONS PETITIONER CONTENDS ARE PRESENTED IN THIS CASE

The first question, which the Petitioner contends is presented in this case, would necessarily have to be answered in the affirmative if all of the premises upon which it is based were true. However, they are

not true. There was probable cause for Petitioner's arrest without a warrant. Any search made incident to and contemporaneous with such arrest is reasonable. None of the constitutional rights of the Petitioner were violated.

The exclusionary rule made applicable in all States by **Mapp v. Ohio,** 367 U.S. 643, 81 S. Ct. 1684, has been rigidly followed for several decades in Texas. See Appendix to **Wolfe v. Colorado,** 338 U.S. 25, 33, 69 S. Ct. 1359, 1364.

The trial court did not refuse to require the State to establish probable cause but, on the contrary, did require such to be established.

The highest appellate court of the State of Texas did not decide "that it was not a violation of the Constitution and laws of the United States to allow evidence introduced over the defendant's objection, where there was no warrant of arrest and no probable cause for the arrest in question, and the State courts in Texas refused to consider the issue of probable cause?" On the contrary, the highest appelate court of the State of Texas did consider the issue of probable cause and decided the issue adversely to the Petitioner's unfounded contentions. The Court of Criminal Appeals of Texas squarely decided that there was probable cause for the arrest of the Petitioner under the facts, and cited numerous cases in support thereof.

Petitioner's Point II is couched in such language that it may only be answered in one way, but it is based upon the premise that "the only evidence introduced reflected that it had been obtained contrary to the Constitution and laws of the United States." The premise is not correct. The Court of Criminal Ap-

peals has found that the evidence was not obtained in violation of any of the Petitioner's constitutional rights. And as it has already been stated, the only question which may be before this Court is whether that determination is correct.

The obvious answer to Question III, presented by the Petitioner, is that the issue of probable cause cannot be delegated to the Executive Branch of the Government. It is unquestionably a judicial function. This question is not presented, however, as the trial court did make a finding in its judicial capacity that probable cause for the arrest of the Petitioner had been established by the evidence before the Court.

The fourth question which the Petitioner contends is presented, that the Petitioner was denied effective assistance of counsel, is easily answered.

He first contends hearsay evidence was utilized over his objection. Hearsay evidence is admissible to establish probable cause. **Draper v. United States**, 358 U.S. 307, 79 S. Ct. 329, 2 L. Ed. 2d 1503.

He then says that only information of an informer was relied upon to establish probable cause for the arrest of the Petitioner. He has failed to recognize that the information received by the officers as to the kind of automobile, the license plate number, the automobile's exact location, and the fact that the Petitioner would be in this automobile was verified by the officers by their visual senses, plus the overt act of the Petitioner after seeing the officers approach.

The record does not reflect that the trial court refused to permit his counsel unlimited cross-examination within the bounds of all recognized rules of evidence. This is a mere contention that Petitioner now makes.

CONCLUSION

We respectfully submit, therefore, that the Petitioner does not present a substantial Federal question and for the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Harris County
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SERVICE

I, Carl E. F. Dally, Assistant District Attorney, Harris County, Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of the Respondent; I do further certify that a copy of the foregoing brief has been forwarded by United States Mail, postage prepaid, to Petitioner's Attorney, Mr. Clyde W. Woody, 1111 Texas Avenue Building, Houston 2, Texas, on this the 27th day of November, 1963.

Carl E F Dally

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